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REFERENCES TO THE RECORD.

The complete record in this case was not printed at the time of appeal to the Circuit Court of Appeals. It was already in print in some 26 volumes which were published from time to time during the district court proceedings. These volumes were filed in the Circuit Court of Appeals by leave of court and were designated as follows:

(R) The record in the Chapter X proceedings—4 volumes

(EI) The record in the equity receivership of Chicago Railways (no. 6839). 11 volumes.

(EII) The record in the equity receivership of Chicago City Railway (no. 71912).

These same designations are used in this brief where needed.

The testimony in the hearings on the reorganization plan was printed in 2 volumes for use in the appeal to the Circuit Court of Appeals. It is here designated as (P. T.)

The exhibits were not printed but filed along with extra copies in the Circuit Court of Appeals by leave of Court. They will be referred to by number.

Certain parts of the record not appearing in the printed volumes were printed in appendices to the briefs of appellants, appellees, and appellee committees. They will be referred to as such where necessary.

Certain important documents are bound in the printed volumes but with their own paging. They appear as follows:

The SEC Advisory Report following (R) p. 1767.

The Reorganization Plan following (R) p. 2338. References are to articles.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 1200 to 1205.

In the Matter of

CHICAGO RAILWAYS COMPANY and CHICAGO CITY RAILWAY COMPANY,

Debtors.

CHARLES H. WORCESTER, et al., NAHUM BIRNBAUM, et al., JAMES A. COLE, et al.,

Petitioners,

vs.

CHICAGO TRANSIT AUTHORITY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The order and opinion of the District Court approving the plan has not been officially reported but has been printed in CCH Bankruptcy Service, Pars. 55,599 and 55,601. The opinion of the Circuit Court of Appeals for the Seventh Circuit is not yet officially reported.

Leave is asked in an accompanying motion to file ten official copies of the opinion, supplied by the clerk of the Circuit Court of Appeals.

JURISDICTION.

The decision of the Circuit Court of Appeals was rendered January 4, 1947. The petition for writ of certiorari was filed April 3, 1947. The jurisdiction of this Court is invoked by petitioners under Section 240(a) of the Judicial Code, as amended (28 U. S. C. Sec. 347(a)).

STATUTE INVOLVED.

The statute involved is Chapter X of the Bankruptcy Act (11 U. S. C. Secs. 501, etc.).

QUESTIONS PRESENTED.

The questions presented are:

1. Are there any rights under the 1907 ordinances which should have been treated differently than they were by the courts below?

2. Should certiorari be granted for the purpose of passing on questions of the weight of the evidence, particularly where the evidence was conflicting and where there is no claim that the decisions below were not sustained by the evidence?

3. Does the statute require the preparation and presentation of a second plan by the Trustees?

4. Were two submissions to the Illinois Commerce Commission required by statute?

STATEMENT OF CASE.

This brief additional statement is made to correct inaccuracies and omissions in petitioners' statement. Other detailed facts are presented in the course of the argument. Respondent will assume that the Court has before it the facts reviewed in the opinion of the Circuit Court of Appeals and also the facts set forth in the motion filed by respondents herein to advance consideration of the petition. Those documents are here incorporated by reference.

The five major prior plans were submitted and acted upon during a period extending from 1930 to early 1945. All contemplated reorganization through the issuance of new securities.

The instant plan was presented by the City of Chicago on February 28, 1945. It originally contemplated acquisition by the City. However, it provided (Sec. II, subdiv. F) that the City had power to assign its right to consummate the purchase to any legal entity authorized under the laws of Illinois to acquire, own and operate such properties.

The plan was ordered submitted to the Illinois Commerce Commission. At about the same time the General Assembly of Illinois created Chicago Transit Authority as a public municipal corporation with power to acquire, own and operate such a system. Thereafter that Commission reported (R. 1693-94) in favor of the plan, provided the City would designate the Authority as its permittee under the Proposal and Plan. The plan was found to be fair. Thereafter the City made the assignments to the Authority, which was substituted in place of the City and filed amendments to carry out that substitution as well as cer-

tain changes suggested in the report of the SEC. This plan as so amended was joined in, approved, adopted and recommended by the six committees representing the holders of the bonds entitled to participate in the plan. Those committees (like the B Committee) had been recognized by the Court to a period of some years in accordance with orders entered by the Court from time to time.

These facts indicate that petitioners' contention that the plan was not submitted to the Illinois Commerce Commission is without foundation.

1907 ORDINANCES.

The 1907 ordinances by their stated terms expired on February 1, 1927. Section 23 provided specifically that nothing contained in the ordinances should be construed as being in any event a grant to the companies extending beyond February 1, 1927.

The ordinances reserved to the City the option to purchase the properties (or to assign the option to a licensee) at a price determined by a formula which assumed a beginning valuation in 1907 and added to it acquisitions and additions at cost plus 15 percent but made no provision for retirements. Section 23 of the ordinances also provided that in the case the City should not exercise its option but should grant the right to another company to operate a street railway in the streets constituting the railway system of the companies, the new company should be required to and should purchase the properties at the "City purchase price". The City has never exercised its option nor has anyone else offered to pay that price, which is now over 172 million dollars. In all prior attempted reorganizations the rights, if any, under the ordinances were washed out.

Petitioners' witnesses assigned to the properties a maximum valuation of 138 million dollars. The testimony of proponents showed the value to be 75 million dollars or less. The Court and the SEC found 75 million dollars to be a present fair value.

These valuations all included the renewal and depreciation funds (depreciation reserve).

This provision of section 23 is now a mere negative force which would prevent this or any other type of reorganization unless an obviously impossible price were secured. Under this plan the tenuous rights under this section are sold with the tangible properties.

PROPERTIES.

On January 31, 1945 the Surface Lines owned 1097.49 miles of track and 217.64 miles of single way trolley and gasoline bus routes. Since that time the bus routes have been increased to over 290 miles. No bus operation was contemplated by the 1907 ordinances, such operation now being under temporary permits. The modernization plan contemplates 227 miles of extended bus operations, 323 miles of bus operations in substitution for street car operations, and 157 miles of new express bus lines (SEC Report, pages 19, note 28).

The average age of all street cars in 1945 was approximately 28 years, only 2½ percent being less than 15 years old. The average age of gasoline buses at that time was 6½ years and of trolley buses 9½ years (SEC Report, page 9).

The number of revenue passengers fell from a high of 897 million in 1929 to a low of 676 million in 1938 (SEC Report, page 15). During the war the number of passengers increased substantially because of gasoline and tire rationing and full employment conditions.

EVIDENCE ON VALUE.

The evidence on value is voluminous and was presented and heard on the theory of estimating prospective earnings and then capitalizing them to arrive at a present day valuation.

With reference to past earnings the evidence showed (Authority Exhibit 51, Objectors' Exhibit 21) that the high of approximately 10 million dollars was earned by the system in 1929, after deducting city compensation but before interest and income taxes. From that year there was a steady decline to 1938, when the net earnings (so defined) were but $2,741,483 (Authority Exhibit 51). They continued under $3,000,000 during the years 1939, 1940 and 1941. Under the impact of the war and with the aid of a fare increase the net earnings began to rise somewhat so that they became $5,624,911 in 1943 but dropped to $5,230,984 in 1944. They dropped still more in 1945, the net for that year after city compensation being $3,977,314 (Authority Exhibit 73).

Between the approval and confirmation of this plan by the District Court, wage increases were granted and other increased costs incurred so that now the lines are operating at a loss, variously estimated from 5 million to 7½ million dollars annually.

Voluminous evidence and exhibits were introduced bearing on the future earning capacity of these properties. Those estimates assumed the grant of an ordinance to permit operation both of street cars and the newer type of bus transportation. The full effects of the modernization program were evaluated both with respect to savings and the retention of traffic. The estimated earnings after modernization, when capitalized at a favorable rate, re-

sulted in an estimated valuation of something over 82 million dollars for these lines and the elevated system combined.

Other testimony for proponents set the value of Surface lines (including the depreciation reserves) at from 65 to 75 million dollars.

The Securities and Exchange Commission in two reports held the valuation of 75 million dollars to be fair.

The petitioners' (objectors') testimony also pertained to prospective earnings which were estimated by its witness at 7½ million dollars, based largely on the theory that the Illinois Commerce Commission would grant the necessary fare increases to attain those earnings.

The evidence also included estimates of increased costs necessary to relieve the badly crowded condition of the cars that prevailed in wartime, and gave consideration to the uncertainties of the future wage scale, the costs that might be involved in solving the pension problem which is particularly acute as this is an old system with older employees, the tendency of taxes to increase, the rising prices of materials that already had taken place and might continue in the future, the declining riding habit of Chicago as above noted, the effects of automobile competition when production of motor cars is restored, the problems of holding traffic with increases in fares, the financial difficulties of the present companies in attempting a modernization program, as well as many other factors bearing on future earning capacity.

The District Court findings on value (order Art. IX, R. 2290) were based "upon specific consideration of prospective earnings of the properties of Chicago Surface Lines".

PLAN SUBMITTED BY TRUSTEES.

After their appointment in November, 1944, the Trustees were ordered to and later did present a plan of reorganization.

SUMMARY OF ARGUMENT.

1. The petition presents no grounds for issuance of the writ. Neither a conflict in decisions between the circuits, nor a conflict with a prior decision of this court or the state courts, nor the existence of an important question of federal law, nor a departure from usual and accepted procedure are alleged.

2. The fantastic "city purchase price" of 172 million dollars under the 1907 ordinances is derived by use of an arbitrary formula which bears little relationship to cost or value. It is 34 million dollars higher than the highest valuation which petitioners' witness has assigned to the properties and 97 million dollars higher than the valuation indicated by the SEC and the District Court. Neither the city nor any one else has agreed to pay that price. No rational buyer would ever pay that much. The provision of Section 23 therefor becomes a mere negative force, a nuisance provision. If this nuisance position has any value as a right, it is one that may be disposed of under Chapter X, together with assets having a more tangible existence.

3. The position of the petitioners is not improved by the provisions of the mortgage. They have no rights in the ordinance. Such rights, if any, belong to the debtor. The obligations of the debtor to pay are now being dealt with by the court through a sale of the property, which includes all "rights", if any, under the ordinances.

4. Petitioners' position that the court should have valued the properties on an assumption of a 10-cent fare, would require the court to give weight to one possible development and disregard all other facts and possible de-

velopments. This is merely a question of the weight of the evidence.

5. The District Court applied juridical concepts of value as prescribed by this Court. The bulk of the evidence on both sides went to the question of probable future earning capacity and the correct rate at which to capitalize it. Certiorari should not be granted to weigh items of evidence nor when, as here, the principles of valuation laid down by this court were followed. Most of petitioners' argument goes to the weight of the evidence.

6. The Trustees did file a plan of reorganization promptly after their appointment. It was submitted to the Illinois Commerce Commission which disapproved it, stating it would not give its consents to the issuance of the securities contemplated. Thereupon, the court found that it could not proceed under that plan.

7. The pending Plan was submitted to the Illinois Commerce Commission which found public interest in the plan, found it to be fair, and suggested that the city designate Chicago Transit Authority as its permittee under the plan. This was done. The statute does not require two submissions to the Commission.

ARGUMENT.

I.

PETITIONERS ADVANCE NO "SPECIAL OR IMPORTANT REASON" FOR SEEKING A WRIT OF CERTIORARI.

Petitioners' arguments can be grouped, aside from technical objections, under two heads—(a) $75,000,000 is too low a valuation, and (b) the 1907 ordinance precludes a sale at less than $172,000,000. In their petition they make no attempt to set forth the "special and important reasons" required by Rule 38 as a basis for review on certiorari. If the petition is viewed in the light of the five grounds listed in that rule, it should fail.

First: It cites no conflicting decision of another Circuit Court of Appeals.

Second: Does it show that an important question of local law has been decided probably in conflict with local decisions? No; it cites cases purportedly in conflict on the 1907 ordinance question, but even the briefest reading of those cases demonstrates that they did not even remotely involve the point.

The *Venner* case (236 Ill. 349—Petition p. 42) upheld the validity of the 1907 ordinance as not *ultra vires* but did not construe or even mention Section 23. The two federal decisions in the *Venner* case (195 F. 788, 200 F. 1023) held that the Illinois decision was *res judicata*. The *Harris Trust* case (39 Fed. (2d) 958—Pet. Br. p. 42), a district court case, did not have Section 23 in issue, as pointed out in the opinion of the Circuit Court of Appeals (p. 12).

Third: Do petitioners claim that the Circuit Court of Appeals decided an important question of federal law which has not been but should be settled by this court? Nowhere in their petition or brief is that claim made.

Fourth: Nor do they point to any federal question decided probably in conflict with applicable decisions of this Court. True they claim that a different value formula should have been used. But the record, the findings and the opinions below reveal that the formula used was that of "probable earning capacity" laid down by this court.

Finally: At no point have petitioners specified any such departure from the usual course of judicial proceedings as to warrant exercise of this Court's power of supervision, although they indulge in a series of vague generalities. Analyzing their generalities, we are left with nothing to bring the case under this fifth reason for granting a writ.

(1) They claim private property is being taken for public use without just compensation. But what they really mean is that the compensation is not enough to satisfy them, but they hope it would be increased if a different rule were followed.

(2) They claim abrogation of their contractual rights with other bondholders and with the city. The record shows no such contracts, only the usual covenant by the *corporation* not to impair the bondholders' lien.

(3) They claim that rights under Section 23 cannot pass to the Trustees nor be sold in a Chapter X sale. But that was a right of the corporation and obviously should be included (for what it is worth) in the enterprise valuation. Otherwise there could be no reorganization, no foreclosure sale, only perpetual deadlock unless a buyer for the properties at $172,000,-

000 could be found—which the record shows is a fantastic assumption.

(4) They claim that the District Court failed to consider or give proper weight to certain value evidence. "We do not grant a certiorari to review evidence and discuss specific facts", *U. S.* v. *Johnston*, 268 U. S. 220, 227. The Circuit Court of Appeals held the District Court's finding on value was amply supported (opinion pp. 15-16).

(5) They make certain technical objections to the proceedings. But the record shows that the Trustees filed a plan (to which petitioners did not object), that the six largest groups of creditors joined in and sponsored the present plan, that this plan was submitted to the Illinois Commerce Commission, and that the only changes subsequently made were those suggested by the Commission itself and the SEC. The Bankruptcy Act does not require re-submission after amendment.

Their brief is persuasive that petitioners are merely seeking another hearing by way of certiorari. But "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Co.* v. *Coty*, 262 U. S. 159, 163.

II.

THE LOWER COURTS GAVE TO SECTION 23 ALL THE FORCE TO WHICH IT COULD POSSIBLY BE ENTITLED—A MERE POSSIBILITY,—WHICH COULD BE SOLD WITH THE OTHER ASSETS.

(Answer to Petitioners' Point I. Pages 41 to 48.)

(a) To petitioners' argument that the court should have passed on the validity of Section 23 of the 1907 ordinances, the brief answer is that the court, in effect, assumed its validity for whatever its worth, and under the Plan proposed to sell it with the tangible assets.

Assuming the validity of that section, we have a provision that the City cannot grant a right to a new company to operate a street railway on the streets now occupied by the debtors unless the new company pays the ordinance price—now at the excessive figure of over 172 million dollars.

We know that valuation is excessive. At the time the formula for its ascertainment was adopted it was expected that the City would promptly exercise its option to buy. For an immediate valuation at that time it might possibly have been appropriate, but as a long term cumulative valuation it bears little relationship to cost or value. The formula provides for adding new acquisitions at cost plus 15% but makes no provision for deducting retirements. It has been the subject of much criticism and has been vigorously attacked by the Illinois Commerce Commission (Appellees' Appx. 5, 6 and 7).

We know that the valuation is excessive for the further reason that even the most optimistic witness for petitioners would not assign a value to the properties higher than

138 million dollars. The SEC and the court ascertained a fair value of 75 million dollars. No purchaser, whether a private or public corporation, could pay from 34 million to 97 million dollars more than the value.

The result is that, if valid, the section indefinitely ties the hands of the City. It cannot exercise its sovereign control over its public streets, which is given to it by both the constitution and statutes of Illinois, without first finding a buyer reckless enough to pay an exorbitant price. Moreover, it indefinitely ties the hands of the court.

On the side of the companies and their remote lien-holders and stockholders there is merely the power to keep the City perpetually deadlocked against the fatuous hope that some day someone may be foolish enough to pay this ridiculous price. No one has ever contracted to pay it. The provision is a mere strategic or nuisance advantage without possibility of translation into reality.

Whatever property rights there may be in this nuisance possibility will be sold with the more substantial and tangible properties of the debtors. The Plan provides for the sale of "all properties, real, personal and mixed, of every kind and nature" (except certain retained assets—and any rights under the ordinances are not retained) (Plan Art. II, division A).

Doubtless, as the Circuit Court of Appeals observed "all contingent rights of a debtor pass to its trustee and become part of its estate, *Pollack* v. *Meyer Bros. Drug Co.*, 233 F. 861, and may be dealt with in Chapter X proceedings".

This is less than a contingent right. It is a mere possibility with no rational hope of realization. The bankruptcy court had the right to deal with it as with other assets. By doing so it broke a deadlock which would otherwise render a reorganization forever impossible.

The soundness of the court's position is further demonstrated by considering the situation in the case of a foreclosure of the first mortgages. Would anyone contend that the first lienholders would remain without remedy until they secure a bidder of 172 million dollars? And if the properties were sold for less at foreclosure, would the City be powerless to grant a franchise for continued operation?

(b) It is a mistake to assume that the valuation of the properties was made on the assumption of no operating rights in the streets. All witnesses on both sides valued a going concern and estimated its future earnings potentialities. Proponents' witness assumed the 1941 ordinance which was then susceptible of being made effective. Petitioners' witnesses also assumed some kind of an ordinance. The court valued the properties as a going entity. Otherwise the properties would have had only a junk or salvage value. The order of approval was specifically based on prospective earnings of an operating concern (Articles VII and IX, Order R. 2290).

(c) These observations demonstrate that the court gave to Section 23 a treatment as if it were valid and free from doubt. Petitioners can ask no more. But it may be relevant to summarize briefly some of the doubts that have been expressed as to Section 23 at various stages of the proceedings:

1. In view of the statute in force in 1907 limiting the grant to a period "not longer than twenty years" (Ill. Rev. Stat. 1945, Chap. 131¼, Sec. 3), and in view of the specific provision of Section 23 that "nothing in this ordinance contained shall be construed as being in any event a grant to the company extending beyond February 1, A. D. 1927", can there now be any rights except at sufferance? After the expiration of a city grant, the operations of a public utility are at will and its properties may be

removed on motion of the municipality (*City of Geneseo* v. *Ill. No. Utilities Co.* (1941), 378 Ill. 506).

2. If the ordinances do permit indefinite operation, do ordinances such as these, that allow operation of street cars only, constitute the grant of a right to operate buses which are rapidly supplanting street cars (SEC page 19 Note 28).

3. The pertinent clause of Section 23 refers to the grant of an ordinance to a "new company" on condition that it pay the ordinance price. Chicago Transit Authority is not a company; it is a municipal corporation (*People* v. *Chicago Transit Authority* (1945), 392 Ill. 77, 93). The term "company" does not include a municipal corporation (*Kansas City* v. *Vineyard* (1895), 128 Mo. 75; *City of Charlottesville* v. *Southern Ry. Co.* (1899), 97 Va. 428, 431, 34 S. E. 98 at 99; *City of Paris* v. *Street Improvement Dist. of Paris* (1943), 206 Ark. 926, 929; 175 S. W. 2nd, 199, at 200). This makes it doubtful whether the provision would be applicable at all.

4. The Illinois constitution (Section 4, Article XI) provides that the grant of the right to operate street railways may be made only by the local municipal authorities. May a municipality alien its constitutional governmental power over its streets by a contract which would indefinitely suspend the exercise of that power? With reference to these very ordinances it has been held that the contractual provision therein limiting fares to five cents (5¢) is invalid as an attempt to bargain away the police power to regulate rates (*Hoyne* v. *Chicago and Oak Park Elevated Railway Company* (1920), 294 Ill. 413, 418-419).

5. There are also doubts whether the provision of the Mueller Act upon which part of Section 23 is founded is constitutional for the last above reason and also because it is not within the title of the act as required by Section

13, Article IV of the Illinois constitution (*People* v. *C. B. & Q. R. R. Co.* (1919), 290 Ill. 327, 331; *Stolze Lumber Co.* v. *Stratton* (1944), 386 Ill. 334).

These doubts need not be resolved. Whatever rights exist under Section 23 will be sold under the Plan.

(d) There is nothing in the cases or statutes cited by petitioners that militates against the action taken by the court below. *Venner* v. *Chicago City Railway Co.*, 236 Ill. 349, merely holds that the grant and acceptance of the ordinances were not *ultra vires* the city or the company. In general the ordinances were held valid notwithstanding a prior ordinance required purchase by the city at a price which it was unable to pay (pp. 364-365). In a sense the case is direct authority against petitioners' position.

Venner v. *Chicago City Railway Co.*, 195 Fed. 788 and 200 Fed. 1023, adds nothing. There the same plaintiff sought to submit the same issues to the federal court which held that the state court decision was conclusive.

The *Harris Trust* case (39 Fed. (2d) 958) is inapplicable, as held by the Circuit Court of Appeals, which said that the case "did not involve the question of whether the City had entered into a contract to buy. In that case the plaintiff sought a decree to direct the receivers to cease paying compensation to the City, and that money in certain funds be paid on the first mortgage bonds."

Nor is the statement "subject to unexpired franchise ordinances" in the 1945 legislation of importance. These are not unexpired franchises. By their stated terms they expired February 1, 1927.

The other cases cited by petitioners are beside the point as they involve the right to operate during the franchise period, which, of course, the companies have fully enjoyed.

There is no substance, we submit, to the contentions respecting Section 23.

III.

THERE WAS NO ILLEGAL IMPAIRMENT OF THE OBLIGATION OF THE SERIES B BONDHOLDERS CONTRACTS.

(Answer to Petitioners' Point II, pages 48 to 51.)

Three fallacies appear in petitioners' argument of alleged impairment.

(a) The obligation to pay principal and interest to the B group is that of the debtor, Chicago Railways Company. The bondholders do not own the debtors' property. That property is now under the jurisdiction of the court with title in the Trustees. It may be sold and disposed of by the court as the necessities of the case may dictate. One of the necessary effects of Chapter X proceedings is to cause a mutation in the rights and interests of creditors and stockholders. Petitioners' argument, if valid, would make every Chapter X proceeding illegal.

(b) There is no direct obligation of senior bondholders to juniors, nor is there any contract between the City and the junior securities. What may have been said in the mortgage was a contract between the debtor and the bondholders—the City was not party to it.

(c) Petitioners argue as if someone had agreed to pay 172 million dollars. That is not the case. The City had a mere option, which it has never exercised. The only remaining possible claim is that the City cannot grant a right to operate to a "new company" without requiring payment of the "city purchase price". The evidence, as well as time and events, have shown that price to be impossible of attainment. Even the 1942 plan, which contemplated issuance of 136 million dollars par value of paper to Surface Lines security holders (which included junior stock to the

B bondholders), was held by the Illinois Commerce Commission to be so financially unsound that it refused to give its consent to the issuance of the securities. The claim to a right under Section 23 is of no dollar value. It is not like a promise or guarantee to pay; it is now merely a bar to governmental action in solving the traction problem in Chicago. If a court of bankruptcy is powerless to deal with this obstacle, it can never work out a reorganization, either by sale or by issuance of securities, until the remotest stockholder is satisfied or 172 million dollars is received.

IV.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW SPECIFIC FACTS. IN ANY EVENT, THE COURT IN CAPITALIZING PROSPECTIVE EARNINGS GAVE DUE CONSIDERATION TO THE POSSIBILITY OF FUTURE INCREASES IN FARES.

(Answer to Petitioner's Point III. Pages 52 to 55.)

The District Court did not find that the debtors was entitled to a 10-cent basic fare. It had no power to make such a determination. The authority to fix fares is in the Illinois Commerce Commission. All the court did was to authorize its Trustees to file a petition for a 9-cent temporary fare (which has since been denied) and a petition for a permanent 10-cent fare, which is still pending.

It is admitted by petitioners that the District Court adopted the capitalization of prospective earnings as its basic criterion of value. This was in accordance with the law enunciated by this court.

> "The basic question in a valuation for reorganization purposes is how much the enterprise in all probability can earn". *Group of Investors* v. *Milwaukee R. R.*, (1943) 318 U. S. 523, 540.

See also:

R. F. C. v. *Denver & Rio Grande Western R. R.* (1946) 90 L. ed. 1134, 1138.

Consolidated Rock Products v. *DuBois,* (1941) 312 U. S. 510, 526.

Petitioner's objection that the court should have assumed a 10-cent fare amounts to a request that the court assume a fact which has not yet materialized, and then also to assume that all other conditions will remain unchanged: in short, that gross income will rise and expenses remain static.

The effect of future fare increases was thoroughly explored in the evidence.

That there is strong tendency for debtor's expenses to rise faster than fare increases can be obtained is shown by the record.

After the approval but before the confirmation of the plan an arbitration resulted in the allowance of higher wages. There was left unadjusted the wage-earners' demand for greater pension benefits.

According to the petition of the Trustees (Authority Exhibit 74) the wage increases, the pending pension demands and the increases in other costs total between $10,370,000 and $11,370,000 per year. Were they applied to the operations of the year ended January 31, 1946, the $4,980,000 net of that year (before city compensation) would be supplanted by a deficit of between $5,390,000 and $6,390,000 annually, before deduction for city compensation. If city compensation were deducted at the prevailing rate of 1½%, the deficit would be $1,000,000 greater.

Yet up to date neither a 9-cent temporary fare nor a 10-cent permanent fare, nor any intermediate rate of fare, has been authorized.

The fallacy of considering only an increased rate of fare without the other factors that might be affected is shown by the history of the debtors. As stated by petitioners (page 54), when the 8-cent fare was allowed in 1942 the Illinois Commission predicted earnings of 7½ million dollars per year. Actually, however, the first year under the increased fare showed a net of only $4,896,475. When permitting the 8-cent fare to stand permanently, the Commission predicted annual earnings of 6 million dollars per year (Objectors' Exhibit 42, page 111). However, the earnings have fallen far short of that estimate in each year (Objectors' Exhibit 21; Authority Exhibit 52).

It would be fruitless at this point to review in detail the many factors which may affect future gross revenues and expenses, some of which have been mentioned in the Statement.

Suffice to say, that there is no logical basis upon which a fare increase can be assumed without weighing the changes that would previously or simultaneously occur in major expense factors and the effect which the increase itself would have on the traffic volume.

But in any event, certiorari should certainly not be granted merely to review one isolated fact. (*United States* v. *Johnston,* 268 U. S. 220, 227).

V.

THE DISTRICT COURT'S VALUATION DOES RESPOND TO THE JURIDICAL CONCEPTS OF VALUE PRESCRIBED BY THIS COURT.

(Answer to Petitioners' Point IV. Pages 55 to 67.)

There is no denial in the petition that the bulk of the evidence pertained to the future earning capacity of the

properties and the proper rate at which to capitalize it. Detailed studies and estimates of future traffic, of the results of modernization, and of possible expense changes were presented. An examination of the printed record and of the exhibits will disclose the great minuteness with which these questions were presented to the court.

Petitioners point IV consists of complaints that this fact or that fact should have been given less or greater weight. It is nowhere contended that the evidence as a whole fails to support the court's conclusion on value.

Such attempts to review or re-weigh the evidence have been declared to be no ground for allowance of the writ. "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." (*General Talking Pictures Corp* v. *Western Electric Co.* 304 U. S. 175, 178.)

A.

The complaint of the court's treatment of the Transit Authority offer is without foundation.

This phase of petitioners' argument is completely unfair to the District Court as it assumes that the court disregarded all evidence of value and "used the Authority's non-competitive price to appraise value." It is not true that the "the District Court's finding of value was admittedly based upon the pressure or leverage exerted by the Transit Authority" (p. 56). Actually all that the District Court said with reference to a negotiated figure was contained in its memorandum opinion of February 15, 1946, which directed the preparation of the findings and order of approval. The court there said:

> "The price offered by the Chicago Transit Authority is not an arbitrary figure fixed by the City of Chicago, but, as hereinbefore noted, was arrived at as a result

of negotiation between the City and the court-appointed committee composed of representatives of all principal interests of Chicago Surface Lines and Chicago Rapid Transit Company."

To assume that the court disregarded all other evidence, which included voluminous testimony and exhibits on prospective earning capacity, is to do violence to the facts and is a clear injustice to the District Court. There had been negotiations; and as early as in the 1941 ordinance, a city purchase was contemplated at prices comparable to those in the present plan (Appellee's Appx., p. 4).

While the plans based on that ordinance visualized a far higher capitalization in stocks and bonds, yet it would seem that the negotiators when they thought of translating the properties into cash had in mind approximately the prices now being discussed.

These facts, of course, were in the record, but the assumption that they were the determining factor is an unjustified assault on the District Court. The findings entered at the time of the order of approval are specifically based upon *prospective earning capacity.*

Complaint is also made that the court should have adjudicated the claims of the City aggregating more than 10 million dollars against the Trustees and the claims of the Trustees against the City amounting to more than five million dollars instead of permitting mutual releases between the City and the Trustees. This again deals with subsidiary evidentiary matters. The principal claim against the city was for alleged damages in the relocation of street railway tracks caused by the subway construction financed by the City and Federal government. That claim has not been seriously regarded in view of the decision in *People* v. *Chicago Railway Company,* 324 Ill. 618, where claims of a similar nature were disallowed.

In any event all of these complaints go merely to the weight given or to be given specific items of evidence.

B.

Certiorari should not be granted to review the action of the Securities and Exchange Commission or the weight which the court accorded its advisory reports.

Here again petitioners seek the writ to review details of the evidence and the weight to be accorded the advisory reports of the SEC.

Petitioners first complain that the Commission should have assumed a 10-cent fare. The Commission took the 1944 fares and expenses as its basis. Had it assumed a higher rate of fare, a higher expense estimate would have been indicated by subsequent events. Moreover, it would have been necessary to weigh the effect of the increased fares on traffic. Both proponents' witnesses and the SEC gave the debtors the benefit of the assumption that modernization of the properties would enable the companies to retain a large share of the heavy wartime traffic which in 1944 produced a gross of 20 million dollars (about 40%) more than the gross of 1940 (Objectors' Exhibit 21).

The uncertainty whether such traffic can be retained, together with uncertainties in expense items, show the futility of petitioners' position.

Second, it is objected that the doubts as to the companies' rights in the streets should have been resolved. The difficulty here is that even if the 1907 ordinances are considered as having been extended beyond their expiration date of February 1, 1927, there is little reason to believe that those ordinances, which permitted street car operation, are authority for bus operation. The almost one thousand miles of bus operations contemplated by the modernization

program are not within their terms. This necessitates new negotiations on the nature and extent of a franchise.

In effect, proponents' witnesses, the SEC and the court estimated the prospective earnings of a system which does not yet exist but which will exist only after modernization. As to the existing system petitioners' witness Peck conceded on cross-examination (P. T. 965): "Possibly from the standpoint of the physical property as it exists in the street, it has reached a point where much of it must be abandoned."

In all those valuations the debtor companies were given the benefit of the favorable assumption that modernization would be attained and an ordinance for the new type of operation would be granted. That was better for the debtors than an abstract legalistic conclusion that the 1907 ordinances still have vitality.

Third, it is argued that the SEC should not have contemplated unification. But unification is a factor in the situation. The City has consistently refused to grant an ordinance unless the Surface Lines and Elevated were unified. The Federal Works Administration, which has advanced over 23 million dollars toward the construction of a subway in Chicago, has of record stated that separate reorganization "is not consistent with the assurances of unification which induced the government to make the grant for the subway project". (E. I. 9746-51, 9754-71).

Furthermore, while it is true that, when the SEC Report was filed, the Elevated lines were not making their operating expenses and the Surface Lines were making something above them, the situation has now reversed, so that the Elevated is now more than paying its operating costs whereas the Surface Lines system is not.

Fourth, it is claimed that by giving the debtors the benefit of modernization and of a more favorable rate of

capitalization, petitioners' claimed valuation could have been justified. The SEC assumed modernization and the existence of a franchise as a basis of its estimates. The rate of capitalization employed was shown by the evidence to have been much more favorable to petitioners than that applied in actual sales in San Francisco, Cleveland and Los Angeles (Authority Exhibit 54) and also far more favorable than the rate at which the incomes of operating traction companies in the twelve large cities of the United States are capitalized, as reflected in their securities, by the market (Authority Exhibits 70, 56 and 57).

This court has taken notice of the infirmities that beset the traction industry in its opinion in *Market Street Railway Company* v. *Railroad Commission*, 324 U. S. 548, where the street car transportation business is referred to as "a generally sick industry".

A cogent argument could be presented to demonstrate that the SEC valuation is generously high and its rate of capitalization too favorable. But this is unnecessary as enough has been said to show that petitioners are here seeking a review only on the weight to be accorded specific items in the record.

C.

The court did consider the prior finding of value and held it no longer applicable. It is no criterion of present day value.

Petitioners point C (pages 61-66) complains of the failure of the court to give weight to another item of evidence appearing in the record, viz., the amount of the par value of securities proposed to be issued under the 1942 Plan. The District Court commented in its opinion:

"That the capitalization rate of 5.397% used in 1942 is now too low because at that time the 1941 franchise ordinance was still in effect, the City was cooperating in the 1942 plan, and a rate increase was in prospect;

That the present companies, even if permitted to continue to operate, would be subject to increasing costs of operation for taxes, labor, and materials, to decreasing traffic, and to payment of compensation for use of the streets;"

The inapplicability of the 1942 figures to the present proceedings is demonstrated by the following considerations:

No contradictory evidence. The SEC, in its report (pp. 21-28) made an exhaustive analysis of the record upon which the valuation in the 1942 Plan was based.

It pointed out that this valuation had been agreed upon by the interested security holders and that the court had before it merely the uncontradicted testimony of experts who testified on behalf of the proponents of the plan.

The Commission, after observing that the valuation was based largely upon the testimony of one witness, found a number of defects in his testimony and estimates, and showed that events have largely disproved his predictions of net earnings.

Sound financial principles ignored. The Illinois Commission in its report on the same plan thoroughly destroyed the valuation and proposed capitalization. In the conclusion of the Examiners it is stated (page 162):

"The proposals on their face demonstrate that as a result of compromise, sound principles of finance and constructive practices of corporate integration have been abandoned. To the security holders of the constitutent companies New Company pretends to offer

securities that, on their face value, are far in excess of what they can ever afford to pay (unless run-away inflation ensue.)" (Appellee Appx. 8.)

On the following page (page 163) the Examiners stated:

"The conclusion is inescapable that New Company pretends to this Commission that it will do more than it possibly can; making impossible promises to its own security holders, to the City, to the car-rider and to the Commission * * *." (Appellee Appx. 9.)

The Examiners further observed:

"either the people of the City of Chicago will be left with a bankrupt and obsolete transportation system or the security holders will soon find that the securities they are receiving represent little more than speculative securities based on hopes and expectations, or the people will find an inevitable increase in fares unless Federal moneys or a subsidy are available." (Pages 163, 164.) (Appellee Appx. 10.)

It should moreover be noted that the securities proposed under the 1942 plan were to represent not only the assets now to be acquired by the Authority but also those now to be retained. Under the instant Plan security holders will have 93 million dollars.

We believe the court was not justified in giving those prior findings any greater weight than it did and that the writ should not be granted merely for the purpose of assigning a different weight to this item of evidence.

With reference to the suggestions that the principles pertinent in eminent domain proceedings should be applied, it needs merely to be noted that neither the cases cited by petitioners (page 65) nor any other principle requires the application of a different rule of valuation because of the presence of a municipality as the prospective buyer. The cases cited by petitioners consider whether "going value" is an element that may be taken into account in

condemnation and if so whether it must be separately appraised. They have no relevance to the case at bar. As a matter of fact in the *Kennebec* case (97 Maine 185, 54 Atl. 6, 60 L. R. A. 856), cited by petitioners, the court said:

> "And it may be said that the fair and equitable value of the system of the Maine Water Company, as a whole, may, in a large sense be measured by its net income at reasonable rates, taking into account future probabilities." (97 Me. 201.)

It is significant that petitioners do not state what they contend to be the true rule for valuation in eminent domain. They hint at reproduction cost which has been repudiated by this court even in rate making procedures (*Market St. R. Co.* v. *Railway Commission* (1945), 324 U. S. 546, 564).

D.

The court applied proper principles of valuation.

From what has been said it is amply clear that the District Court based its valuation conclusions on "how much the enterprise in all probability can earn." Petitioners' complaints amount to no more than that some fragment of evidence should have been given greater or less effect or that the court should have adopted some other (undefined) principle of valuation which would have given them the result which they sought.

It is respectfully suggested that it is not the function of a writ of certiorari to re-weigh or re-appraise the evidence or to upset firmly established legal principles announced in repeated decisions of this court.

VI.

THE TRUSTEES WERE DIRECTED TO AND DID FILE A PLAN IN ACCORDANCE WITH SECTION 169.

(Answer to Petitioners' Point V. Pages 67 to 72.)

Petitioners argue that the Trustees should have been directed to "file a plan or report the reasons why a plan cannot be effected." Their lengthy review of the legislative background of Section 169 was entirely unnecessary.

The Court on November 15, 1944 stated: "The Trustees are directed, in compliance with Section 169 of Chapter X to file a plan or make a report as required by that section on or before November 29, 1944 * * *." (R. 1053.) In obedience to that direction, the Trustees did on November 28, 1944 file a plan of reorganization. That plan would have reorganized Surface Lines into a new corporation which would also have acquired the Rapid Transit properties through the bankruptcy case pending in the same court.

The statement in the note (Petitioners' Brief, page 68) that the plan was not one for reorganization of the instant debtors is clearly incorrect. The debtors would have been reorganized under that plan by the issuance of new securities for the old. It was a complete plan of reorganization.

Appellants made no objection to it. Their present theory that there should be separate reorganization was advanced by them only after the Trustee's plan had been disapproved by the Illinois Commission and after the SEC had recommended exclusion of petitioners.

Petitioners' real objection is, therefore, not that the Trustees failed to file a plan but that they failed to file a

plan in exact conformity with the lately-conceived wishes, hopes and desires of the junior interests represented by petitioners.

Since there was a plan filed by the Trustees, Section 169 has been satisfied. It can certainly not be contended that they were obligated to continue filing new plans or amendments to the old until every remote junior creditor, even though he remained mute, was satisfied.

The District Court considered that the Trustees had filed a plan and the Circuit Court of Appeals stated "while it is true that it is the primary responsibility of the trustee to file a plan of reorganization, here the trustees did file a plan and before its approval, the creditors of the debtor companies, in the form of a substitute plan, filed the present plan" (p. 11).

This contention of petitioners is obviously without substance.

VII.

THE PLAN WAS SUBMITTED TO THE ILLINOIS COMMERCE COMMISSION IN ACCORDANCE WITH SECTIONS 177 AND 178.

(Answer to Petitioners' Point VI. Pages 72 to 75.)

The statement is made that the Plan has never been submitted to the Illinois Commission.

The facts are that on February 28, 1945, the City filed its proposal and plan to purchase the properties of the Surface Lines. On April 23, 1945, the Court entered an order submitting this Plan to the Illinois Commission (R. 1591-92).

After the entry of this order, the Plan was submitted

to the Illinois Commission, which on June 6, 1945, filed a report stating in part:

> "Based on the foregoing, the Commission with respect to the City Plan, is of the opinion and finds;
>
> 1. That there is public interest in the Plan presented to this Commission in this proceeding;
>
> 2. That provided the City designates the Chicago Metropolitan Transit Authority (created by act of the legislature of the State of Illinois) as its permittee under the Proposal and Plan submitted herein, the Commission may not exercise its opinion as to the public interest therein adversely, in the face of legislation designed to accomplish this specific purpose recently enacted by the State Legislature that empowers this Commission; * * *" (R. 1693-4.)

Later in the same report the Commission held that the Plan "is fair". Stating it another way, this means that the Plan is in the public interest provided the City assigns its rights to the Authority.

On August 17, 1945, an order was entered substituting the Authority for the City in the City's plan. This assignment complied strictly with the proviso in the Commission's report as to the designation by the City of the Authority as its permittee.

These facts are not candidly stated in petitioners' brief, which seeks to create the impression that the Plan was never submitted to the Illinois Commerce Commission. The Plan which is now before the Court is, in substance, the same as that submitted to the Commission. The Commission has expressly found that municipal ownership was in the public interest and that private ownership could not furnish the necessary capital.

The requirement of Section 177 is that the Plan shall not be approved until it shall have been submitted to the Commission and an opportunity shall have been afforded

the Commission to suggest amendments or offer objections to the Plan. That requirement was fully met.

Neither Section 177 nor 178 demands two submissions to the state commission. One only is required.

Since the Plan was submitted to the Illinois Commission, which suggested an amendment that has been made, there has been full compliance with Sections 177 and 178.

CONCLUSION.

Petitioners ask that another attempt at reorganization under private ownership be made. Five prior attempts have failed. How often must the process of trial, error and failure be repeated? Nothing in the record or petitioners' argument makes it appear that another effort will be more successful than the other five.

After twenty years of receivership and bankruptcy, marked by intensive labor, repeated "solutions" and as many frustrations, together with a steady decline in the value of the properties, the conclusion has been reached that only a public authority, with properties free from the burden of local taxation, with income probably free from income taxes and with power to issue bonds the interest of which is low in rate and likewise tax free, can bring a solution to Chicago's muddled traction situation.

Six bondholders groups which are senior to the petitioners (four of which will receive less than par for their bonds) have agreed that the only hope lies in the Plan before the Court. The SEC, the District Court and the Circuit Court of Appeals have found the Plan to be fair, equitable and feasible.

If this Plan is defeated, or if dilatory and obstructive tactics make impossible the sale of the Authority's revenue

bonds, the debtors and their security holders have nothing to look forward to except a probable repetition of the disastrous events of the past two decades.

We ask that the petition be denied.

Respectfully submitted,

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